IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR

Second Appeal No.596 of 2006

(Ajabrao Narayanrao Deshmukh v. Samadhan Vishram Kale and another)

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Office Notes, Memoranda of Coram, appearances, Court's orders or directions : Court's or Judge's orders and Registrar's orders.

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Shri M.V. Mohokar, Advocate for Appellant.

CORAM : R.C. Chavan, J.
DATE : 3rd December, 2007

1. By this appeal, the appellant/original plaintiff in Regular Civil Suit No.47 of 1989 before the learned Civil Judge, Junior Division, Shegaon, assails the dismissal of his suit by the learned Civil Judge as well as the dismissal of his appeal by the learned Additional District Judge, Khamgaon. According to the appellant, his present appeal raises the following four substantial questions of law :

> *"1. That both the courts below have totally failed to appoint commissioner for local investigation under Order 26 Rule 9 of Civil Procedure Code, when the question arises for their decision about the boundaries of the suit plot of the plaintiff as well as defendant. That as such both the courts below have committed grave and serious illegalities while dismissing the suit RCS no.47 of 89 ?*
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> *2. When both the courts below have dealt with the point of encroachment, therefore both the courts ought to have appoint the commissioner under Order 26 Rule 9 of C.P.C. and ought to have got measurement on the suit plot. Thus the findings given on the point of encroachment is perverse and contrary to the*

above rules ?

3. That whether in absence of the measurement given according to the sale deed exhibit 163 which was relied the courts below, whether the findings of both the courts below about no encroachment is valid or not ?

4. That whether both the impugned judgment and decree passed by both the courts below are in conformity with the judgment reported in 2004(1) Mh.L.J. 138 in case of Kishanlal Maniklal Rathi v. Dinkar Yashwant Patil ?

2. I have heard the learned Advocate for the appellant. According to the learned Advocate, both the Courts below failed to take into consideration the report of Advocate Shri Joshi, who was appointed as Commissioner by the Trial Court. He has produced for my perusal a copy of report of the Commissioner, Exhibit 56. According to the learned Advocate, the Commissioner has observed in para 1A of the report that plot no.336 of the plaintiff is an open plot and to the east is the house of the defendants. According to him, this observation of the Commissioner would show that plot no.336 of the plaintiff and the defendants' house are adjacent to each other. The learned Judges of the Courts below have observed on the basis of a Nazul map produced at Exhibit 142 before the Courts below that beyond the eastern boundary of the plaintiff's plot, there is a public road. Therefore, the learned Judges of the Courts below have held that the plaintiff failed to prove encroachment.

3. It is not clear as to how the observations of the Commissioner could be said to be contradictory to the findings recorded by the learned Judge of the first Appellate Court in para 18 of his judgment. The Commissioner had merely seen the situation on the spot. He had not carried out any measurement. He had noted that beyond the defendants' house, there was an open plot. Had the plot been measured, then the question as

to whether there is a road in between the two properties could have been ascertained. Now when there is an open space, whether it is a space for a road or the said space is owned by the parties, would be a question, which could be decided only by reference to public record and not by the observations of the Commissioner.

4. The learned Advocate for the appellant next submitted that in that case, the Courts below should have appointed the Commissioner to resolve the boundary disputes and for that purpose, he placed reliance on the two judgments of a learned Single Judge, viz. (i) Kisanlal Maniklal Rathi v. Dinkar yashwant Patil, reported at 2004(1) Mh.L.J. 138, and (ii) Ramchandra s/o Bhikaji Jagtap v. Dudharam Langruji Padvekar dead through L.Rs. Bulkabai Padvekar and others, reported at 2004(1) Mh.L.J. 278. The learned Single Judge had observed in para 10 of the judgment in Ramchandra s/o Bhikaji Jagtap v. Dudharam Langruji Padvekar dead through L.Rs. Bulkabai Padvekar and others that the cases of boundary disputes and disputes about the identity of lands are instances when a Court should order a local investigation under Order 26 Rule 6 of Civil Procedure Code.

5. Ordinarily, it would be for the parties to prove their case by tendering appropriate evidence before the Court and it would not be open for the Court to lend a helping hand to a party by securing evidence in the form of local investigation by the Commissioner. What the learned Single Judge clearly intended to say was that it was desirable to have such a local investigation carried out in order to resolve the controversy. It does not, however, follow that the Court would be under a duty while deciding a civil suit to order such investigation on its own. In this case, it is not a case of the appellant that he had sought appointment of Commissioner for measuring the respective sites of the parties. On the other hand, it is seen from the report of the Commissioner, that the Commissioner had been appointed, he

had seen the spot and rendered a report. The grievance made out is in fact that the Commissioner's report was not considered by the Courts below in resolving the controversy before the Court. Since the report is of such a nature that the Commissioner could not have thrown any light on the boundary disputes, the Courts below cannot be faulted in referring to the report in the judgments. I do not see as to how the report of the Commissioner contradicts the findings recorded by the learned Judge of the first Appellate Court.

6. The appeal does not, therefore, give rise to any question of law muchless substantial question of law. The findings of both the Courts below are purely based on a question of fact, viz. as to whether the plaintiff had proved that the defendant had encroached upon the plaintiff's site.

7. The appeal is, therefore, dismissed.

JUDGE

pdl